United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-6019

United States Court of Appeals
FOR THE SECOND CIRCUIT

FIRST NATIONAL CITY BANK, et al.
Plaintiffs-Appellants,
76-6029

THE CHASE MANHATTAN BANK, et al.
Plaintiffs-Appellants,
76-6019

MELLON NATIONAL CORPORATION,
Plaintiff-Appellant,
76-6026

CHEMICAL NEW YORK CORPORATION, et al.
Plaintiffs-Appellants,
76-6035

MORGAN GUARANTY TRUST COMPANY, et al.
Plaintiffs-Appellants,
76-6023

—against—

FEDERAL TRADE COMMISSION, et al.
Defendants-Appellees.

JOINT REPLY BRIEF OF PLAINTIFFS-APPELLANTS

SHEARMAN & STERLING
Attorneys for Plaintiffs-Appellants
Citibank, N.A. (Formerly
First National City Bank)
and Citicorp
53 Wall Street
New York, New York 10005

JOHN E. HOFFMAN, JR.
HERMAN E. COMPTER
FREDERICK A. GERTZ
Of Counsel

MILBANK, TWEED, HADLEY &
McCLOY
Attorneys for Plaintiffs-Appellants
The Chase Manhattan
Bank (N.A.) and The Chase
Manhattan Corporation
One Chase Manhattan Plaza
New York, New York 10005

EDWARD J. REILLY
KENNETH A. PERKO, JR.
Of Counsel

KIRKPATRICK, LOCKHART, JOHNSON
& HUTCHISON
Attorneys for Plaintiff-Appellant
Mellon National Corporation
1500 Oliver Building
Pittsburgh, Pa. 15222

JOSEPH A. KATARINCIC
DAVID L. FEIGENBAUM
Of Counsel

CRAVATH, SWAINE & MOORE
Attorneys for Plaintiffs-Appellants
Chemical New York Corporation
and Chemical Bank
One Chase Manhattan Plaza
New York, New York 10005

RALPH L. MCAFEE
RICHARD S. SIMMONS
BURTON K. GORDON
Of Counsel

DAVIS POLK & WARDWELL
Attorneys for Plaintiffs-Appellants
Morgan Guaranty Trust
Company of New York and
J. P. Morgan & Co. Incorporated
One Chase Manhattan Plaza
New York, New York 10005

TAGGART WHIPPLE
STEVEN F. GOLDSTONE
HENRY H. KORN
Of Counsel

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Preliminary Statement

This reply brief is submitted on behalf of the plaintiffs-appellants in these actions (the "Banks") in reply to the Brief for Appellees Federal Trade Commission ("FTC Brief"). The issues dealt with here are the nature and significance of the District Court's dismissal of the Banks'

complaints (Argument I), and the hardship imposed upon the Banks in the absence of the judicial relief they sought and were denied (Argument II).

ARGUMENT I

The District Court had subject matter jurisdiction of these actions.

The gravamen of the FTC Brief is that the commencement by the FTC of an enforcement proceeding, in another jurisdiction, some three and one-half months *after* the commencement of these actions, and two and one-half months *after* the FTC's motions to dismiss these actions (a motion is made when notice of the motion is served) terminated the Banks' right to "pre-enforcement" judicial review of the FTC's agency action.

Apart from the obvious potential it would create for a waste of judicial time, this proposition is utter nonsense. If the actions were sound when brought, subsequent unilateral action by the FTC cannot retroactively expunge the causes of action or destroy the Banks' rights. Evidently realizing how unsound this argument is, the FTC now contends that the dismissal below was not "for want of subject matter jurisdiction or for failure to state a claim" but rather was "a thoroughly sound exercise of discretion" (FTC Brief, pp. 6-7).* Glossed over is the fact that the so-called exercise of discretion is grounded on facts occurring after the commencement of the actions.

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* This position represents an abrupt reversal by the FTC of what it stated to be the motions it made below, wherein it asked the District Court "to dismiss the above captioned actions on the grounds that this Court lacks jurisdiction over the subject matter of these actions and that plaintiffs have failed to state a claim upon which relief can be granted, . . ." (App. A-259). Likewise, Judge Frankel in his Memorandum and Order stated that "The FTC's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim is now before the court." (App. A-309).

Implicit in the FTC's argument that the District Court properly exercised discretion is the necessary concession that there was subject matter jurisdiction when the Banks commenced these actions.

The FTC in arguing that the Third Circuit's decision in *A.O. Smith Corp.* v. *FTC*, 1976-1 Trade Cas. ¶ 60730 (3d Cir. Feb. 11, 1976), merely held that the Delaware district court's decision to exercise its jurisdiction was not an abuse of discretion misses the fundamental proposition of *A.O. Smith*, that when a court has subject matter jurisdiction, it should exercise that jurisdiction where the ripeness standard of *Abbott Laboratories* is met.

> "We conclude that the District Court had jurisdiction; that it properly exercised that jurisdiction because the controversy was ripe for jurisdictional resolution . . . ." *A.O. Smith Corp.* v. *FTC*, 1976-1 Trade Cas. ¶ 60730 (3d Cir. Feb. 11, 1976), Addendum to Bank's Main Brief, Page 10.

Consideration of the *Abbott Laboratories* standards gives force to this reading of *A.O. Smith*. A finding of ripeness is a finding that the issues are set for resolution and that significant hardship will result from withholding review. It would be anomalous to deny review where by definition such denial would create significant hardship.

II

The Impact of the subpoenas is sufficiently direct and immediate to create a hardship warranting judicial review.

The FTC contends at length that the Banks were not exposed to any "hardship" before the enforcement proceeding was commenced since criminal prosecution for refusal to comply with the subpoenas was only a "theoretical risk", and in any event the FTC eventually did commence enforcement proceedings in which the Banks' legal objections could be heard.

The question whether the risk of criminal prosecution is more theoretical than immediate involves, as elaborated by the FTC Brief, a judgment or prediction whether legal objections will be found to be substantial or frivolous. Distinctions among objections that are "substantial", or "meritorious", or "frivolous", or in "good faith" or "bad faith" are, of course, determinations that courts are daily called upon to make. In the present context it is the existence of the risk of an adverse decision on that issue that warrants the existence of the judicial remedy of court review of final agency action, whether through the provisions of the Administrative Procedure Act or the Declaratory Judgment Act. 5 U.S.C. § 551 *et seq.*, 28 U.S.C. § 2201. Comfort is not retroactive, and the distress caused by the presence of criminal sanctions is not relieved by the subsequent gratuitous observation that such sanctions were not, and in the clear light of ensuing events were not likely ever to have been, invoked.

In the *A.O. Smith* litigation, the FTC made similar protests of modesty regarding the arsenal of remedies at its disposal. Commenting on the availability of criminal sanctions, the Delaware District Court noted:

> "In the instant matter, FTC counsel advised the Court at oral argument of the unlikelihood of imposition of criminal sanctions. The Supreme Court has discounted analogous representations noting that the existence of the statutory criminal sanction is the governing criteria. *Cf. Abbott Laboratories* v. *Gardner, supra*, 387 U.S. at 154, 87 S. Ct. 1507." *A.O. Smith Corp.* v. *FTC*, 396 F. Supp. 1108 at 1116, n. 12 (D. Del. 1975), *aff'd in part, rev'd in part*, CCH 1976-1 Trade Cas. ¶ 60730 (3d Cir., Feb. 11, 1976).

Substantial rights should not be subject to the whim of an administrative agency to determine in its own good time whether it regards a legal position to be merely

"not . . . meritorious", as opposed to "so frivolous as to betoken bad faith". (FTC Brief, p. 18, n. 28).

The actions were commenced by the Banks to avoid a painful dilemma. The FTC argues that the dilemma was not real, and in any event it was cured by the belated institution of enforcement proceedings,* and thus the Banks should no longer complain about the "hardship" their actions were designed to avoid. There are three principal answers to this contention.

In contrast to the *General Electric* litigation relied upon by the FTC, the enforcement proceeding here was *not* "promptly commenced." *General Electric* v. *FTC*, 1976-1 Trade Cas. ¶ 60823 at p. 68,597 (N.D.N.Y. 1976). Here, the enforcement proceeding was an afterthought, filed months after the Banks sought judicial relief and the FTC moved to deny it.

Second, in contrast to the assurances of adequate opportunities to challenge the subpoenas at issue in an enforcement proceeding, the FTC is on record as opposing the application of any such liberal doctrine in the enforcement proceedings it so generously commenced, claiming:

> "It is established that discovery is inappropriate in proceedings to determine the enforceability of agency subpoenas. Enforcement proceedings are summary in nature, . . ." (App. A-274).

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* *FTC* v. *Rockefeller*, Misc. No. 75-0229 (D.D.C., filed Dec. 19, 1975). Upon motion of the Banks, that proceeding has been transferred to the Southern District of New York where it is now pending under docket number 76 Civ. 1826 (MEL). Judge Lasker has scheduled a conference of all parties on May 21, 1976. Contrary to the suggestion of the FTC, we submit that the appropriate course upon a reversal of Judge Frankel's dismissal order would be a remand to the district court for further proceedings consolidated with *FTC* v. *Rockefeller*. *Cf. General Electric Co.* v. *FTC*, 1976-1 Trade Cas. ¶ 60823 at pp. 68,597-98 (N.D.N.Y. 1976).

Third, the actions challenging the subpoenas issued to the Banks do not represent run of the mill disputes regarding agency subpoenas. The Banks attack the subpoenas upon the fundamental jurisdictional principle that the FTC has no jurisdiction or authority to investigate banks or the banking industry. So far from the astonishing declarations by the FTC that "the limitation on the Commission's authority . . . is not a total prohibition of investigations of banks" (FTC Brief, p. 11), we submit that the FTC is, by its organic statute, subject to just such a broad limitation. See Banks' Main Brief, pp. 12-18. Indeed, it is only as a consequence of the recent limited qualification to the general exception for banks from FTC subpoenas, that these cases are here at all. See FTC Decision and Order, dated August 21, 1975 (App. A-38, 40-41). Judicial review of such a fundamental jurisdictional issue does not even require exhaustion of administrative remedies. *Leedom* v. *Kyne*, 358 U.S. 184 (1958); see Banks' Main Brief, pp. 28-29.*

While it may be true that in a routine case seeking review of an agency subpoena a dismissal for "want of equity" may be appropriate, as found in *Reisman* v. *Caplin*, 375 U.S. 440 (1964) and *Anheuser-Busch* v. *FTC*, 359 F. 2d 487 (8th Cir. 1966) (See FTC Brief, pp. 8, 9), it does not follow that *Reisman* requires discretionary dismissal of any pre-enforcement challenge to an agency subpoena for "want of equity". This would be a sorely strained construction of *Reisman* ignoring the later, wholly consistent, decisions of the Supreme Court in the *Abbott Laboratories*

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* *Leedom* v. *Kyne* was recently cited for this very proposition:

> "Several courts have reached the merits of questions not exhausted by administrative review, and at least three pertinent exceptions have come to be recognized: (1) where the agency has clearly violated a right secured by statute or agency regulation, *Leedom* v. *Kyne* . . ." *Atlantic Richfield Co.* v. *FTC*, 398 F. Supp. 1 at 11 (S.D. Tex. 1975), *appeal docketed*, No. 75-2802, 5th Cir.

trilogy. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Toilet Goods Assn.* v. *Gardner*, 387 U.S. 158 (1967) and *Gardner* v. *Toilet Goods Assn.*, 387 U.S. 167 (1967). Where "fundamental questions" are presented, such as those raised by the Banks going to the underlying jurisdiction of the FTC, the issues require the careful *Abbott Laboratories* analysis.

> "Supporting its thesis that actions may not be maintained against the Commission prior to the issuance of notices of default, appellants [FTC] find analogies in cases implicating attempts to enjoin the enforcement of summons issued by the Internal Revenue Service, *Donaldson* v. *United States*, 400 U.S. 517 (1971); *Reisman* v. *Caplin*, 375 U.S. 440 (1964), or of subpoenas issued by grand juries, *In re Grand Jury Proceedings (Schofield)*, 486 F.2d 85 (3d Cir. 1973). We agree with appellees that enforcement of administrative summons, or grand jury subpoena cases do not reach the fundamental questions raised in this appeal." *A.O. Smith Corp.* v. *FTC*, 1976-1 Trade Cas. ¶ 60730, at p. 68,139, n. 2 (3d Cir. Feb. 11, 1976).

The issues raised on this appeal are surely as fundamental as those in *A.O. Smith*. From its very creation, the FTC has been denied the authority to investigate banks. The proposition upon which our case is founded has been stated directly and simply by the Supreme Court:

> "The FTC, under § 5 of the Federal Trade Commission Act, has no jurisdiction over banks." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 336 (1963).

The extent of any erosion of this basic statutory doctrine presents a novel, significant and clearly "fundamental question". It warrants far more than summary treatment.

CONCLUSION

The Appellants respectfully request that this Court reverse the Order of the District Court and grant such other and further relief as may be appropriate.

Dated: New York, New York
May 10, 1976

Respectfully submitted,

SHEARMAN & STERLING
Attorneys for Plaintiffs-Appellants
Citibank, N.A. (Formerly
First National City Bank)
and Citicorp
53 Wall Street
New York, New York 10005

JOHN E. HOFFMAN, JR.
HERMAN E. COMPTER
FREDERICK A. GERTZ
Of Counsel

MILBANK, TWEED, HADLEY &
McCLOY
Attorneys for Plaintiffs-Appellants
The Chase Manhattan
Bank (N.A.) and The Chase
Manhattan Corporation
One Chase Manhattan Plaza
New York, New York 10005

EDWARD J. REILLY
KENNETH A. PERKO, JR.
Of Counsel

KIRKPATRICK, LOCKHART, JOHNSON
& HUTCHISON
Attorneys for Plaintiff-Appellant
Mellon National Corporation
1500 Oliver Building
Pittsburgh, Pa. 15222

JOSEPH A. KATARINCIC
DAVID L. FEIGENBAUM
Of Counsel

CRAVATH, SWAINE & MOORE
Attorneys for Plaintiffs-Appellants
Chemical New York Corporation
and Chemical Bank
One Chase Manhattan Plaza
New York, New York 10005

RALPH L. MCAFEE
RICHARD S. SIMMONS
BURTON K. GORDON
Of Counsel

DAVIS POLK & WARDWELL
Attorneys for Plaintiffs-Appellants
Morgan Guaranty Trust
Company of New York and
J. P. Morgan & Co. Incorporated
One Chase Manhattan Plaza
New York, New York 10005

TAGGART WHIPPLE
STEVEN F. GOLDSTONE
HENRY H. KORN
Of Counsel

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK.

being duly sworn, says: that I am over the age of eighteen years and am not a party herein, and that on the 10th day of May , 1976 , I served two copies of the within Brief

upon the attorneys hereinafter named at the places hereinafter stated and set opposite their respective names by depositing the same, properly enclosed in a post-paid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department at 399 Park Avenue within the City and State of New York, directed to said attorneys at their respective addresses given below, which were designated by them for that purpose upon the preceding papers in this action, to wit:

Name	Address	Attorney for
Robert J. Lewis, Esq.	Federal Trade Commission Washington, D.C. 20580	Defendants-Appellees

Michael Steiner

Sworn to before me this
10th day of May , 1976.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978